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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1564

VINCENT J. BERNABEI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 6th Circuit entered on May 16, 1975.

OPINIONS BELOW

The opinion of the United States District Court was filed May 22, 1974, which is included in the attached Appendix.

The order of the United States Court of Appeals dismissing the Appeal of the petitioner was rendered by order without a formal opinion. A copy of said order is included in the attached Appendix.

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JURISDICTION

The judgment of the Court of Appeals was entered May 16, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether the defendant's Constitutional right to a fair trial was violated when the Jury clerk did select a jury panel at random for his criminal trial for alleged failure to file income tax returns but deliberately and systematically excluded all jurors who had previously served in the trial judge's courtroom, in violation of the provision of the Jury Selection Act and Plan adopted by the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States' Fifth Amendment. 28 USC 1861 et seq. Jury Selection and Service Act of 1968 as amended.

STATEMENT OF FACTS

The defendant, Vincent J. Bernabei, was charged on an information in four counts filed in the United States District Court for the Northern District of Ohio, Eastern Division, on February 3, 1972, with willfully failing to file income tax returns for the years 1965, 1966, 1967 and 1968, all in violation of Section 7203, Internal Revenue Code of 1954, 26 USC Section 7203. The defendant was tried before a jury, the Honorable Robert Krupansky, D. S., presiding. After four days of trial, appellant was

found guilty on all counts. On May 19, 1972, the appellant was sentenced to one year and $5,000.00 fine on each count, to run consecutively, the total sentence being four years and $20,000.00, four months to be served in jail and the balance probation, provided that the fine is paid within three years. Defendant's motion for a new trial was overruled on June 1, 1972. On June 5, 1972, the defendant filed his notice of appeal.

The Court of Appeals affirmed the conviction in its opinion dated February 28, 1973. Petition for Certiorari was denied as well as Petition for Re-hearing.

On January 14, 1974, defendant filed Motion for New Trial on the ground of newly discovered evidence that the jury panel for his trial had not been selected pursuant to the Jury Selection and Service Act of 1968, 28 USC Section 1861 et seq., and that he was therefor deprived of his Constitutional rights to a fair and impartial trial. After hearing on the motion, Judge Robert Krupansky of the U. S. District Court for the Northern District of Ohio, Eastern Division, denied defendant's motion on May 22, 1974.

On May 28, 1974, defendant filed his notice of appeal to the Sixth Circuit Court of Appeals. On May 16, 1975, the appeal was dismissed.

The hearing before the District Court consisted of evidence by the Deputy Clerk of Courts that *before* she chose a petit jury in the subject case from a card file of qualified jurors, she deliberately excluded from the panel assignment wheel (from which the case venire was selected) all names of qualified jurors who had previously served in the trial Judge's Court. By eliminating these names, the Deputy Clerk eliminated the random jury selection required by the Jury Selection Act, and thus also eliminated the right to a fair trial as guaranteed by the Constitution.

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REASONS FOR GRANTING WRIT

The question presented is of great public interest since it relates to the question of random selection of a Petit Jury in a criminal trial without a third party eliminating certain qualified jurors – said third party having no authority whatever to exercise such elimination. If this procedure is allowed, it results in elimination of qualified jurors without a voir dire and without the knowledge or approval of the presiding judge or attorneys representing the parties.

The procedure followed in this case violated the defendant's Constitutional right to a fair trial and a trial by a Petit Jury of qualified jurors selected at random as provided by the Jury Selection Act of 1968 28 USC 1861 et seq., and also violated the Jury Selection Plan as adopted by the United States District Court of the Northern District of Ohio.

In view of the important question here involved, it is submitted that this Writ of Certiorari should be granted.

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN KENNEDY LYNCH
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR-72-63

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT J. BERNABEI,
Defendant.

ORDER OF U. S. DISTRICT COURT

(Filed May 22, 1974)

KRUPANSKY, J.

Defendant, Vincent J. Bernabei, was convicted of five counts of willful failure to file federal income tax returns in May, 1972, sentenced to four years imprisonment and fined $20,000.00. On January 14, 1974, defendant moved this Court for a new trial on the basis of newly discovered evidence, pursuant to Rule 33, Fed. R. Crim. P., asserting that certain improprieties occurred in the selection of the jury panel in contravention of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. §§ 1861 et seq., and this Court's local jury plan promulgated pursuant thereto. In a brief filed subsequent to the motion, defendant further alleged that the selection of the jury panel "might

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well have violated Defendant's rights to an impartial and unprejudiced jury panel." 28 U.S.C. § 1867 (e).

At a hearing on the motion defendant called only one witness, Mrs. Agnes E. Haas, jury clerk, who testified to the procedure utilized to select the jury panel from which the petit jury was chosen for defendant's trial. Mrs. Haas' testimony revealed:

1. On May 10, 1972, Mrs. Haas selected forty-one cards, each containing the name, address, record of previous jury service etc. of a prospective juror, from a box (qualified jury wheel), containing one-hundred or more cards previously selected at random from this District Court's master jury wheel, and notified the persons whose names appeared on those cards to report for jury service on May 16th;

2. On May 10th and May 15th, Mrs. Haas informed eight and eleven veniremen, respectively, who had reported but were not selected for jury service on those days to also report for service on May 16th. These nineteen veniremen's cards had previously been drawn from the master and qualified jury wheels in the same manner as the forty-one cards selected on the 10th of May;

3. Mrs. Haas excluded the cards of prospective jurors who previously served as jurors in criminal cases wherein this Judge presided in the selection of the forty-one cards on May 10, 1972.

The Court finds that the manner of selection outlined above does not constitute a substantial failure to comply with the selection requirements set forth in the Act, furthermore, the Court finds, as a matter of law, that defendant is precluded from challenging the jury panel selection on the grounds that it did not conform to the Act. Section 1867 (a) of the Act expressly limits such challenges to a time not later than voir dire examination. *See, United*

States v. *DeAlba-Conrado,* 481 F.2d 1266, 1269 (5th Cir. 1973); *United States* v. *Silverman,* 449 F.2d 1341, 1344 (2nd Cir. 1971), *cert. denied* 405 U.S. 918 (1972).

Constitutional challenges are not, however, precluded by Section 1867(a). Section 1867(e) provides:

> (e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

In order to successfully challenge a jury on constitutional grounds a defendant must prove "that the jury selection process utilized in his case systematically and arbitrarily excluded a cognizable class or ethnic group from jury service to his prejudice." *United States* v. *DeAlba-Conrado, supra* at 1270. *See also, Davis* v. *United States,* 411 U.S. 233 (1973); *Whitus* v. *Georgia,* 385 U.S. 545 (1967); *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341 (1963).

The defendant herein has failed to either plead or prove a prejudicial systematic exclusion. No evidence was adduced at hearing on this issue, and none may be inferred from the evidence that was presented. A review of the jury panel lists affixed to the Government brief clearly reflects that the jury panel from which the petit jury was selected contained a wide racial, ethnic, and economic cross-section of the "community" this Court serves. *Wil-*

liams v. *Florida,* 399 U.S. 78 (1970); *Swain* v. *Alabama,* 380 U.S. 202 (1965); *Frazier* v. *United States,* 335 U.S. 497 (1948).

In view of the foregoing, defendant's Motion for a New Trial is hereby denied, and defendant is hereby Ordered to report to the United States Marshal within twenty (20) days of entry of this Order to commence serving the sentence imposed by this Court on May 19, 1972.

IT IS SO ORDEDED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

No. 74-2043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

VINCENT J. BERNABEI,
Defendant-Appellant.

ORDER

(Filed May 16, 1975)

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

On receipt and consideration of an appeal in the above-styled case; and

Noting that conviction here involved was affirmed by this court on February 28, 1973, in appeal No. 72-1866, with a petition for certiorari being denied thereafter; and

Further noting that this appeal is from denial of a motion for new trial, filed January 1974, on the claimed ground of newly discovered evidence; and

Believing said motion was properly denied,

Said appeal is hereby dismissed.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1564

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willful failure to file individual income tax returns for 1965 through 1968, in violation of 26 U.S.C. 7203. He was fined $20,000 and sentenced to a term of four years' imprisonment, all but four months of which was suspended on the condition that he pay the fine within three years. The court of appeals affirmed (473 F.2d 1385), and this Court denied certiorari and rehearing (414 U.S. 825, 1052).

Nineteen months after he was convicted and sentenced, and almost one year after the court of appeals affirmed his conviction, petitioner moved for a new trial on the ground of newly-discovered evidence that the jury panel had not been selected in accordance with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, *et seq.*, and the district court's local jury plan promulgated pursuant to that Act. After a hearing, the district court denied the motion and the court of appeals dismissed the appeal (Pet. 3; Pet. App. 1a-5a).

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At the hearing on petitioner's motion for a new trial, Mrs. Agnes E. Haas, the jury clerk and sole witness, testified that she selected the jury panel from a box, or qualified jury wheel, that held 100 to 150 prospective-juror cards. These cards previously had been chosen at random from the district court's master wheel. Mrs. Haas selected at random 41 cards, each of which contained, *inter alia,* the name, address, and prior jury service record of a prospective juror. In selecting the cards, she eliminated no more than three cards of jurors who had served previously in criminal cases presided over by the trial judge. However, no prospective juror cards were excluded for any other reasons. The individuals whose cards were selected, and 19 other veniremen whose cards previously had been drawn from master and qualified jury wheels in the same manner as the 41 cards, were notified to report for jury service (Pet. App. 2a; R. 22-23).[1]

1. Petitioner bore the burden of proving that the manner of selecting the jury panel deprived him of his constitutional right to a fair and impartial trial. See, *e.g., Whitus* v. *Georgia,* 385 U.S. 545, 550; *Tarrance* v. *Florida,* 188 U.S. 519, 520; *Foster* v. *Sparks,* 506 F.2d 805, 819 (C.A. 5); *United States* v. *De Alba-Conrado,* 481 F.2d 1266, 1270 (C.A. 5); *United States* v. *Ware,* 473 F.2d 530, 537 (C.A. 9).

In denying petitioner's motion for a new trial, the district court correctly held that he had "failed to either plead or prove a prejudicial systematic exclusion" because "[n]o evidence was adduced at hearing on this issue" and that such an exclusion could not "be inferred from the evidence that was presented" (Pet. App. 3a). Petitioner did not claim or prove that any cognizable class or group qualified for jury service had been excluded from the list of veniremen. There is no basis for petitioner's claim that the method of jury selection deprived him of his constitutional right to a fair trial.

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[1]"R." refers to the record appendix in the court of appeals.

2. Petitioner's claim under the Jury Selection and Service Act of 1968 is untimely. His motion for a new trial was filed 19 months after his conviction (Pet. App. 1a). Under 28 U.S.C. 1867(a) he was required to raise the issue "before the voir dire * * * or within seven days after * * * [he] discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever * * * [was] earlier * * * ." The procedures prescribed by that provision are "the exclusive means by which a person accused of a Federal crime * * * may challenge any jury on the ground that such jury was not selected in conformity with the [Act's] provisions * * * ." 28 U.S.C. 1867(e). The district court therefore correctly held that "as a matter of law * * * [petitioner was] precluded from challenging the jury panel selection on the grounds that it did not conform to the Act" (Pet. App. 2a). See *United States* v. *De Alba-Conrado, supra,* 481 F.2d at 1269; *United States* v. *Silverman,* 449 F.2d 1341, 1344 (C.A. 2), certiorari denied, 405 U.S. 918; *United States* v. *Greene,* 489 F.2d 1145, 1148 (C.A.D.C.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.